

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

614
NOS. 22558 AND 22559
(CRIMINAL NO. 356-68)

317

UNITED STATES OF AMERICA,
Appellee,

v.

EDWARD KEMPER,
Appellant.

UNITED STATES OF AMERICA,
Appellee,

v.

JOSEPH N. RICHARDSON,
Appellant.

REPLY BRIEF OF APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 5, 1969

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DATED: MAY 7, 1969

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The Government does not attempt to meet the contention that the precinct confrontation was prejudicially suggestive, but devotes its major argument to an attempt to show that the in-court identification of Richardson was admissible by reason of having an independent origin. (pp. 6-7) In support, the Government emphasizes the eye witness's "excellent . . . opportunity for sustained observation at the time of the crime," ^{1/}

^{1/}Citing Williams v. United States, D. C. Cir. No. 21,072 (February 24, 1969), slip op. at 4.

pointing out that the witness "even noticed a scar near [Richardson's] chin."

Appellant agrees that the matter of the scar is important, but submits that the time at which it was noticed is most significant. The description which the eyewitness gave the police within a few minutes after the incident made no mention of any scar. (Tr. 74, 78) ^{2/} At the trial, after having identified Richardson at the precinct, the eyewitness testified about the scars on the robber's face. (Tr. 29)

The Government's second point is that the eyewitness's "identification of Richardson at the trial was positive, based not on the clothing Richardson saw [sic] at the precinct but on Richardson's general appearance." (p. 7) However, the record shows that at the trial the eyewitness first identified Richardson, not as the robber, but as the man he identified at the precinct.^{3/}

^{2/} Transcript references are to the transcript of September 11 and 12, 1968.

^{3/} During the "Wade-Stovall" hearing, out of the presence of the jury, the following questions and answers were recorded:

"Q. [Mr. Nunzio, Counsel for the Government] Well, do you see the man in the courtroom today that you did identify down at the precinct?

"A. [Mr. Bailey] Yes, I do.

"Q. Where is he seated there, sir?

* * * *

"MR. NUNZIO: If Your Honor please, may the record show that he is the only defendant at the table wearing glasses.

"I think that satisfied the identification of Mr. Richardson for the record." (Tr. 42-44)

Only after the Court ruled that evidence of the precinct identification was inadmissible (Tr. 111) did the eyewitness identify Richardson as one of the robbers. (Tr. 119-20) This demonstrates that the in-court identification was based on the pre-trial confrontation rather than having an independent source. In that confrontation, Richardson was made to stand out from the others by the contrast of their appearance and by the fact that only he was made to wear clothing previously identified with the crime. ^{4/} That clothing was a material element in the pre-trial precinct identification. ^{5/}

^{4/} Cf. Foster v. California, 37 LW 4281, 5 CrL 3001, 3002 (April 1, 1969). Before the precinct identification, the eyewitness had recognized the coat Richardson was made to wear as being connected with the crime. (Tr. 33)

^{5/} On cross-examination, the eyewitness said:

"Q. Isn't it a fact that you then identified Mr. Richardson because he was wearing a coat and hat the second time that he was not wearing the first time?

"A. Yes, sir." (Tr. 51)

On redirect examination, he said:

"Q. At the time you made your identification of the number one man, were you looking at the hat or coat alone or at the entire man?

"A. The entire man.

"Q. Did the clothing in any way suggest this man to you?

"A. Well, his clothing, I remembered the clothing he had on, yes.

"Q. Did you, in fact, know whether these were the clothing involved in the holdup, this hat and coat?

"A. They were the same color." (Tr. 54)

The Government contends that, even if the evidence of identification of Richardson were found to be improperly admitted, the conviction of Kemper would not have to be reversed. (pp. 7-8) There is no basis for this Court to conclude, however, that the improperly admitted identification did not contribute to the jury's finding of guilt against Kemper. The Government states that the two principals were seen running to the car in which Kemper was subsequently arrested. But the record shows no such continuity of view of the principals: the eyewitness left the front of the store when the principals fled and returned to the door after a conversation with the assistant manager. (Tr. 16-18, 165-67) The improperly admitted identification of Richardson, who was linked to the car in which Kemper was arrested, therefore, could have contributed to the jury's finding of guilt against Kemper.

CONCLUSION

WHEREFORE, appellants respectfully request this Honorable Court to reverse the convictions of appellants to remand this matter to the United States District Court for the District of Columbia for further trial with the identification evidence excluded.

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Nathan J. Paulson
CLERK

JOSEPH N. RICHARDSON,

Appellant.

BRIEF OF APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,

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JOSEPH N. RICHARDSON,

Appellant.

BRIEF OF APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

I.

STATEMENT OF ISSUES

1. Whether the courtroom identification of Appellant Richardson was the fruit of a pretrial identification which violated Appellant's right of counsel and right to a fair trial.

2. Whether the pretrial identification procedure included such highly suggestive factors as to render the admission of the courtroom identification a denial of due process.

This case was not previously before this Court under the same or similar title.

II.

STATEMENT OF CASE

The appeal in No. 22558, in forma pauperis, is from a judgment of the United States District Court for the District of Columbia, dated October 25, 1968, convicting Appellant Kemper of robbery under section 3202 of Title 22 of the District of Columbia Code, and sentencing him pursuant to section 5010(b) of Title 18, United States Code, under the provisions of the Federal Youth Corrections Act.

The appeal in No. 22559, in forma pauperis, is from a judgment of the United States District Court for the District of Columbia, dated October 30, 1968, convicting Appellant Richardson of armed robbery, robbery, and assault with a dangerous weapon, under sections 2901, 3202, and 502 of Title 22 of the

District of Columbia Code, and sentencing him to imprisonment for periods of four (4) to twelve (12) years, two (2) to six (6) years, and two (2) to six (6) years, respectively, said sentences to run concurrently.

This Court has jurisdiction under section 1291 of Title 28, United States Code.

III.

STATEMENT OF RELEVANT FACTS

Appellant Richardson was arrested at the precinct. (Tr. 63)^{1/} The arresting officer, Sergeant Kirby, was aware of the Wade^{2/} decision and understood that, if a suspect wants a lawyer present at the line-up, Wade requires the police to let him contact a lawyer and, in the event he cannot afford a lawyer or does not have one of his own, it is the responsibility of the arresting officer to put him in contact with someone who will represent him. (Tr. 64) The form (P.D. 47) which was read to Appellant Richardson at the precinct and read into the record by Sergeant Kirby does not say anything about a right to counsel at a line-up. (Tr. 64-66)

During the course of the alleged crime, the store manager, the identifying witness, had an opportunity to observe the number one subject, who he later identified as Appellant Richardson, under good light conditions (Tr. 27, 117), during

^{1/} All transcript citations are to the transcript of September 11 and 12, 1968, unless otherwise specifically indicated.

^{2/} United States v. Wade, 388 U.S.218 (1967).

a period of ten minutes (Tr. 28), from as close as approximately two feet (Tr. 30-31, 115), and to observe him from front, side, and rear. (Tr. 30, 115) Within a period of at most five to ten minutes after the incident (Tr. 74, 114), the store manager described the number one subject to the police as: a Negro male, 20-25 years, five-foot seven, 140 pounds, medium brown skin, neat appearance, wearing a long black trench coat and a black hat. (Tr. 74, 78)

Approximately one hour later, accompanied by the assistant store manager, the store manager went to the precinct to give the police some more information. (Tr. 32) While he was there, a coat was brought in with some money in it, and while the money was being counted, the assistant store manager recognized one of the bills, and the store manager said that the coat was like the one he had seen on the subject number one. (Tr. 33)

The store manager was asked to identify someone and was taken to a room in which "four or five people" were seated. (Tr. 34-35) He was unable to identify anyone at that time. (Tr. 35, 50, 155-56) He was asked if the type of clothing would help him, and he said that it would. (Tr. 36) He left the room and, when he returned, he identified Appellant Richardson, who was then wearing the brown hat and black coat, as subject number one. (Tr. 36-38)

The four individuals shown to the store manager at the precinct were Appellants Richardson and Kemper, Jerry Burke, another defendant below, and Earl Brooks, an alleged participant who served as a Government witness at the trial. (Tr. 63, 67, 78) The first time the store manager saw these four individuals, they were seated (Tr. 35, 45); the second time, when he identified Appellant Richardson, they were standing. (Tr. 40, 45-46, 51) Appellant Richardson is five feet, four and one-half inches tall and weighs 125 pounds; Burke is five feet, eight inches tall and weighs 165 pounds; Appellant Kemper is five feet five and a half and weighs 140 pounds (Tr. 163); and Brooks is six feet, one inch tall and weighs 168 pounds. (Tr. of Sept. 16, 1968, p. 94) At the time of the precinct identification, Brooks had a moustache and a goatee, and Burke had a moustache. (Tr. 79-80) The store manager identified Appellant Richardson because he was wearing a coat and hat the second time, which he was not wearing the first time (Tr. 51), and stated that the clothing suggested the man: "I remember the clothing he had on, yes." (Tr. 54) None of the other three individuals viewed by the store manager at the precinct was asked to put on the black raincoat and brown hat. (Tr. 83-84)

At the trial, the store manager stated that subject number one was wearing a dark raincoat and a brown hat (Tr. 12, 28) and had some type of scars on his face (Tr. 29), and

that he was about five feet seven and one-half or five feet eight. (Tr. 31-32) He had no recollection of the clothing worn by the others when he viewed them at the precinct (Tr. 46-47), remembered all four individuals as being approximately the same height (Tr. 46), and wouldn't say that Appellant Richardson was the shortest of the four. (Tr. 48) The store manager saw Appellant Richardson again before the trial at court hearings. (Tr. 48) He identified Appellant Richardson in the courtroom at the trial below as the man he identified at the precinct. (Tr. 42-44)

IV.

SUMMARY OF ARGUMENT

The pretrial precinct line-up was a critical confrontation between Appellant Richardson and the Government's eye witness, at which Appellant Richardson was entitled to counsel under the Sixth Amendment of the Constitution of the United States, under the decision of the Supreme Court of the United States in United States v. Wade, 388 U.S. 218 (1967). He was not informed of that right.

The circumstances of the precinct line-up were so prejudicially suggestive as to deprive Appellant Richardson of due process of law. The Government did not meet its burden of showing by clear and convincing evidence that the in-court identification had a foundation independent of the precinct

confrontation and its admission into evidence deprived Appellant Richardson of a fair trial.

The conviction of Appellant Kemper as an aider and abettor must be reversed if the conviction of Appellant Richardson is not permitted to stand.

V.

ARGUMENT

A. Statement Of Points Presented With Reference
To The Portions Of The Record Appellants
Desire The Court To Read

Appellant Richardson was not informed of his right to counsel at the post-arrest, pretrial line-up and could not have made an intelligent waiver of that right. (Tr. 63-66)

The procedure at the pretrial line-up was highly suggestive in several respects. The store manager witness was first shown a coat which was identified with a bill recognized from the robbery and which he then identified. (Tr. 33) Appellant Richardson was the smallest man in the line-up, he was clean-shaven whereas two of the other three were wearing a moustache or a moustache and goatee, and he was the only one made to wear a coat and hat similar to that worn by the subject described by the witness. (Tr. 79-80, 83-84, 163; Tr. of Sept. 16, 1968, p. 94)

The evidence does not clearly and convincingly show that the in-court identification had a foundation independent of

the precinct line-up. The description given to the police within ten minutes of the incident significantly conflicts with the appearance of Appellant Richardson and the in-court recollection. (Tr. 12, 28-29, 31-32, 46, 48, 74, 78, 153) Approximately one hour after the incident occurred, the eye-witness could not identify Richardson until he put on the hat and coat identified with the crime. (Tr. 34-38, 49-51, 153-56) The in-court identification was based on factors not included in the description given immediately after the incident and which could only have been observed at the precinct line-up. (Tr. 12, 28-29, 31-32, 48, 74, 78, 156)

At the time of the trial, Appellant Richardson was twenty years old and had gone to the eleventh grade of school. (Tr. 86; Tr. of Sept. 17-18, 1968, pp. 58-60) The trial court ruled that the precinct identification was a line-up and, as such, was a crucial stage of the proceeding, that Appellant Richardson "was properly warned of his rights to counsel, and that there was "in effect, a waiver of the right to counsel when the accused took the stand [sic] as he did and did not affirmatively request counsel that the particular line-up did not accord with the provisions of the Fifth Amendment and could not be testified to by the witness; and that the witness's in-court identification would be admitted as being of sufficiently independent origin. (Tr. 109-12) The jury found Appellant Richardson guilty on the three counts of armed robbery,

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robbery, and assault with a dangerous weapon, and Appellant Kemper was found guilty on the count of robbery and not guilty on the counts of armed robbery and assault with a dangerous weapon. (Tr. of Sept. 17-18, 1968, pp. 134-36)

B. The Pretrial Identification Violated Appellant
Richardson's Rights

The alleged crime and the precinct identification both occurred subsequent to the decision in United States v. Wade, 388 U.S. 218 (1967), in which the Supreme Court held that at such a line-up, the accused is entitled to counsel. The arresting officer was aware of the Wade decision and understood it as holding that an accused is entitled to counsel at a pre-trial line-up. But the statement of rights read and shown to Appellant Richardson, as read into the record by the arresting officer, made no mention of the right to counsel at the line-up. The record does not show that, in connection with the line-up, Appellant Richardson was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." Carnley v. Cochran, 369 U. S. 506, 516 (1962)

At the time of the trial, Appellant Richardson was twenty years of age and had gone to the eleventh grade in school. No showing was made at the trial that he had knowledge of a right to counsel at the line-up before his arrest in this case.

The reading of an article headed, "Warning as to your rights," to the accused is clearly suggestive that they are being informed of all of their rights. The "warning as to your rights" only refers to rights relating to questioning and its only statement of a right to counsel is to a right to a lawyer during questioning. The absence from that warning, as read into the record by the arresting officer, of any reference to a right to counsel at an identification line-up implies that no such right is available. The trial court erred, therefore, in holding that Appellant Richardson has waived his right to counsel at the line-up.

C. The In-Court Identification Was Not Shown
To Have A Foundation Independent Of The
Pretrial Precinct Identification

In Wade, the Supreme Court set out various factors to be considered in determining whether the in-court identification has been come at by exploitation of primary illegality:

"Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup." (388 U.S. at 241. Footnote omitted)

Here, the store manager had ample opportunity to observe the alleged holdup and the persons participating. However, upon first seeing Appellant Richardson approximately one hour after the incident, the witness could not identify him, and his subsequent identification was a result of Richardson being singled out of the group by wearing the clothing identified with the robbery, whereas the other individuals in the lineup were readily distinguishable from Richardson by size, clothing, and facial hair. The pre-lineup description given to the police within ten minutes of the incident did not describe Richardson accurately and differed in important respects from the witness's recollection at the trial. Not only was there a discrepancy as to size, but the pre-lineup identification made no mention of scars. In court, the witness stated that the subject had scars on his face, as Richardson does.

On December 12, 1968, this Court decided three cases in which it considered circumstances to be weighed in determining whether an in-court identification has a foundation independent of an illegal pre-trial confrontation. No. 21, 249, Hines v. United States, No. 21, 001, Clark v. United States, and No. 19, 846, Clemons v. United States, 4 Cr L 2221. In addition to the factors listed in Wade, this Court noted in Hines that one witness had seen the robber once prior to the robbery, and testified that she had paid particular attention to his appearance; and another witness testified positively

that she "certainly would have remembered the defendant even if she had not seen him at the pretrial showing, and gave a detailed description of both the defendant's features and his clothing. In Clark, the court noted that the witness recalled clearly the robber's distinctive physical appearance, and that he "testified firmly and positively that his in-court identification was not influenced by the pre-trial confrontation. Here, there was no showing that the store manager witness had seen the robber prior to the robbery, no positive testimony that Appellant Richardson would have been identified in the absence of the pretrial confrontation, and the witness's description of the subject given within minutes after the incident was vague and general and failed to mention the scars which were an important factor in the in-court identification.

Considering all of these factors, it cannot be said that the store manager's in-court identification was shown by clear and convincing evidence to have had a foundation independent of the pretrial precinct confrontation.

D. The Pretrial Line-Up Confrontation Was
So Highly Suggestive As To Deny
Due Process of Law

In Wade, the Supreme Court cited examples of conduct of pretrial confrontations for identification to illustrate "both the potential for substantial prejudice to the accused at that stage and the need for its revelation at the trial."

(388 U.S. at 232-33) Among the examples are that tall suspects were made to stand with short non-suspects, that the other participants in the line-up were grossly dissimilar in appearance to the subject, and that only the suspect was required to wear distinctive clothing which the culprit allegedly wore.

Here, the four participants in the line-up were dissimilar in size and Appellant Richardson was the smallest, he was clean-shaven, whereas two of the other three participants wore either a moustache or a moustache and goatee, and only Richardson was required to wear clothing which had previously been identified with the crime. The effect of procedure used at the line-up was to single out Richardson from the other three dissimilar participants, rather than to have the witness identify him from among other similar individuals. This effect is demonstrated by the fact that the witness could not identify any of the four participants when they were all seated, and none wore the clothing identified with the crime, and that Appellant Richardson was only identified when he wore the previously identified clothing and all of the line-up participants were standing, thus emphasizing their difference in size.

This procedure resulted in such unfairness that it infringed Appellant Richardson's right to due process of law. Palmer v. Peyton, 359 F. 2d 199 (C.A. 4th Cir. 1966) Here, there was no showing of imperative need for immediate

confrontation as was found to exist in Stovall v. Denno, 388 U. S. 293 (1967). There was no evidence to justify the procedure used, instead of a line-up procedure which would not have unfairly singled out Richardson from the other participants.

The circumstances surrounding the pretrial precinct confrontation, which violated Appellant Richardson's rights to counsel and to a fair trial, was so unnecessarily suggestive and conducive to irreparable mistaken identity as to deny Richardson due process of law. The in-court identification was not shown by clear and convincing evidence to have a foundation independent of the illegal pretrial precinct confrontation and was improperly admitted into evidence by the court below.

E. The Conviction Of Appellant Kemper As An
Aider And Abettor Must Be Reversed If
The Conviction Of Appellant Richardson
Is Reversed

Appellant Kemper was charged with aiding and abetting the alleged robbery, and his conviction rests equally upon the tainted in-court identification of Appellant Richardson who he was accused of aiding and abetting. While the rule is that trial and conviction or even identification of the principal is not a prerequisite to the conviction of the aider and abettor, United States v. Provenzano, 334 F. 2d 678 (C.A. 3d

Cir. 1964), cert. den. 35 S. Ct. 440, here the improperly admitted evidence was equally a link in the chain of leading to the conviction of Appellant Richardson and of Appellant Kemper. A critical element of the evidence against Appellant Kemper was the improperly admitted identification of Richardson as one of the alleged principals. It cannot be said with assurance that the jury would have found Kemper guilty of robbery as an aider and abettor of Richardson and another, in the absence of the in-court identification of Richardson. All of the evidence against Appellant Kemper was directed to showing his link with Richardson and another person who was not a co-defendant at the trial below, which was recognized in the Court's charge to the jury:

[The Government has] charged Mr. Kemper and Mr. Burke with the offenses of the indictment, armed robbery, robbery and assault with a dangerous weapon on the theory that Mr. Kemper and Mr. Burke aided and abetted the two individuals whom the testimony has shown were in the Safeway performing the actual holdup.
(Tr. of Sept. 17-18, 1962, p. 124)

In order to convict a defendant of aiding and abetting a substantive offense, the proof must establish that the crime in question was committed and that the person charged as an aider and abettor, aided and abetted its commission. United States v. Provenzano, supra, 334 F. 2d at 691.

VI.

CONCLUSION

For the reasons stated, appellants respectfully request this Honorable Court to reverse the conviction of Appellant Richardson of armed robbery, robbery, and assault with a dangerous weapon, to reverse the conviction of Appellant Kemper of robbery, and to remand this matter to the United States District Court for the District of Columbia for further trial with the challenged identification evidence excluded.

Respectfully submitted,

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